FUI LIAN CREDIT & LEASING SDN. BHD.

v.

KIM LEONG TIMBER SDN. BHD. & ORS.

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[SUIT NO. 67 OF 1986]
4 OCTOBER 1990

CONTRACT: *Lease agreement of equipment - Repossession - Whether equipment sold at undervalue - Validity of termination - Harsh, oppressive, inequitable and unconscionable - Penal clauses.*

CONTRACT: *Guarantee - Avoidance - Allegation of false and fraudulent misrepresentation of deceased defendant - Knowledge and assent - Non est factum - Onus on signatory - Reasonable care - Plea available only in exceptional circumstances - Blind or illiterate or not of full capacity - Mistake as to legal effect - Validity of demand - Necessity for notice - Terms and conditions of guarantee - Contracts Act 1950, ss. 95 and 96.*

CIVIL PROCEDURE: *Summary judgment - Mere allegations - Not specifically raised in the defences - Requirements of sufficient traverses rather than general pleas in pleadings - Liquidated damages must be strictly proved - Specific aggregate sum - Unsatisfactory features - Necessity for summons and affidavit evidence to state specific defence.*

By a lease agreement, the plaintiff company F leased to the 1st defendant company D1 certain equipment. The 2nd to the 8th defendants, D2 - D8, guaranteed the payment of all sums of money that might be due or become due to F under the lease agreement.

D1 defaulted in 10 payments; as a result F terminated the said lease agreement and repossessed the equipment leased and now claimed the sums allegedly owing to it. This is an application by F under O. 14 for summary judgment.

Counsel for D1 contended:

(a) that F sold the repossessed equipment at an undervalue;

(b) that the lease agreement had not been legally terminated;

(c) that the lease agreement is and was invalid, void and unenforceable because it was lopsided, harsh, oppressive, inequitable and unconscionable.

The guarantors contend that although they did sign the guarantee they disclaim liability in that they had signed it as a result of false and fraudulent misrepresentation of the eighth defendant, now deceased.

D3, D5, D6 and D7 were bankrupts. The three guarantee agreements are all dated 3 January 1984 and contain identical terms and conditions.

Held:

[1] The general pleas of "does not admit" and "put the plaintiff to strict proof thereof" in the defences of the defendants are not sufficient traverses.

[2] In the absence of any statutory requirement, the plaintiff was not obliged to give notice of termination to the lessee unless so required by the agreement; in addition Clause 16.1(i) of the lease agreement provides for immediate termination without notice if the lessee defaults in any payment.

[3] D1's contention in (c) above was not deposed to by D1 nor was there any submission made thereon.

[4] There is no evidence or even suggestion that the alleged false misrepresentation was made with the knowledge and assent of the plaintiff nor that the plaintiff knew of the making of the fraudulent misrepresentation and chose to keep silent about it.

[5] (i) For the plea of *non est factum* to be available a defendant must show that he, in signing the documents, had acted with reasonable care. To make out the plea a defendant must show that he signed the document in the belief that it was in fact, and that at least, as against innocent persons, his failure to read and understand it was not due to negligence or carelessness on his part.

(ii) The plea will not be available to a person whose mistake was a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser.

[6] Based on the terms of the 'Guarantee & Indemnity' in this case, a proper and valid demand is not a condition precedent to the institution of the action. The 'Guarantee & Indemnity' does not so expressly provide; nor has it been shown that the nature of the contract requires such a condition to be implied.

[7] The Court chose not to express any view on the deductibility or otherwise of the sale proceeds in diminution of the plaintiff's claim.

[8] It is clear that the liability of the guarantor-defendants in instant case for damages would include the instalments payable up to the date of repossession of the 4 tractors by reason of the 1st defendant (lessee) having defaulted in paying those instalments for which it become liable before the date of repossession - *Moschi's* case and *O' Dea's* case applied.

[9] The claim of repossession charges and expenses are liquidated damages or claims and must be strictly proved. The Court is not satisfied that the claim of this sum of RM29,556.28 has on balance of probabilities been properly proved; having regard to the unsatisfactory features of the evidence in relation to the sums claimed, the Court was not prepared to grant summary judgment for the specific aggregate sum as claimed.

[10](a) Though the summons and the affidavits in support were not prepared in line with the provisions of order r. 2(1), (*i.e.* that there is no defence to the action except as to damages), the relief, nevertheless, is granted because on the pleadings and the evidence adduced, the points raised in relation to liability under the agreements are clear and unarguable.

(b) It must be stressed that, as a matter of good practice, if there is reasonable basis for believing that there is valid defence only as to damages, the O. 14 summons and the affidavit evidence in support must be accordingly tailored.

[Judgment for the plaintiff for damages; amount of claim to be assessed.]

Cases referred to:

Rutter v. Tregent [1879] 12 Ch D 758
North Central Wagon and Finance Co. Ltd. v. Graham [1950] 1 All ER 780
Credit Corporation (M) Sdn. Bhd. v. Bulan Sabit Sdn. Bhd. & Ors. [1989] 1 CLJ (Rep) 444
Robophone Facilities Ltd. v. Blank [1966] 1 WLR 1428
Hart v. O'Connor [1985] 2 All ER 880
Multiservice Bookbinding Ltd. & Ors. v. Marden [1978] 2 All ER 489
Alec Lobb Ltd. v. Total Oil G.B. Ltd. [1985] 1 All ER 303
Avon Finance Co. Ltd. v. Bridger & Anor. [1985] 2 All ER 281

Balakrishna v. Bank of Bengal [1891] 15 Bom 585
Earl of Aylesford v. Morris [1873] LR 8 Ch App 484 [1861 - 73] All ER Rep 300
Lloyds Bank Ltd. v. Bundy [1974] 3 All ER 757; [1975] QB 326
Lombard North Central p/c v. Butterworth [1987] 1 All ER 267
Moschi v. Lep Air Services Ltd. [1972] 2 All ER 393
O' Dea & Ors. v. Allstates Leasing Systems (WA) Pty. Ltd. & Ors. [1982 - 83] 152 CLR 359
Petelin v. Cullen [1975] 132 CLR 355
Public Works Commissioner v. Hills [1906] AC pg 376
Saunders v. Anglia Building Society [1970] 3 All ER 961
United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & Ors. [1987] CLJ (Rep) 1048
United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oil (M) Sdn. Bhd. [1982] CLJ (Rep) 358

Legislation referred to:
Contracts Act 1950, ss. 79, 95, 96

For the plaintiff - Chew Peng Hui; M/s. Battenberg & Talma
For the 1st, 2nd, 4th, 5th, 6th & 7th defendants - Ting Sing Chuan; M/s. Yong & Wong

JUDGMENT

Chong Siew Fai J:

This is an application by the plaintiff under O. 14 for summary judgment against the 1st defendant as lessee and against the 2nd, 4th, 5th, 6th and 7th defendants as guarantors for the sum of RM285,915.22 made up as follows:

(a) Arrears of rentals from February 1985 to November 1985 RM203,334.00

(b) Overdue interest or late charges calculated at the rate of 0.065% per day from 3 January 1984 to 8 January 1986 (4014 days) RM 53,024.94

(c) Costs of repossession and various expenditure incurred in relation to the sale of the caterpillars as particularised in para. 4 of the amended statement of claim (see also particulars under para. 3 of James Leong's affidavit made on 20 October 1987)

RM 29,556.28
RM285,915.22

and for further interest on RM203,334 at 0.065% per day from 9 January 1986 to date of actual payment and costs.

On record it may appear a little odd that the application by way of summons in chambers was dated 18 November 1987 when defences were dated 16 May 1986 (i.e. more than 1 1/2 years later). This is because initially the plaintiff filed an O. 14 application. 3 days later, the defendants filed 2 defences both dated 16 May 1986. Subsequently the plaintiff obtained leave and amended its writ and statement of claim. To make easy reading and to avoid confusion, the earlier O. 14 application was withdrawn and a fresh one filed which is the present application dated 18 November 1987.

Since the defendants in this application did not amend their defences after being served with the amended statement of claim, they are taken to rely on their 2 defences both dated 16 May 1986 in answer to the amended statement of claim (O. 20 r. 3(6)).

Affidavits

Altogether the plaintiff relies on 4 affidavits and the defendants, on 6 affidavits. They are listed below and will, for convenience, be referred to as indicated within the brackets immediately appearing behind each of them:

A. For the plaintiff:

(a) James Leong's affidavit made on 20 October 1987 (Leong's 1st affidavit).
(b) James Leong's affidavit made on 23 July 1986 (Leong's 2nd affidavit).
(c) James Leong's affidavit made on 19 June 1987 (Leong's 3rd affidavit).
(d) James Leong's affidavit made on 18 August 1987 (Leong's 4th affidavit).

B. For the 1st defendant:

5th defendant Ho Boon Hong's affidavit made on 1st defendant's behalf on 20 June 1988.

C.(a) 2nd defendant Wong Yuk Hung's affidavit made on 20 June 1988 (2nd defendant's affidavit).
(b) 4th defendant Lu Mee No's affidavit made on 13 July 1988 (4th defendant's affidavit).
(c) 5th defendant Ho Boon Hong's affidavit made on 20 June 1988 (5th defendant's affidavit)
(d) 6th defendant Ngui Ngee Tee's affidavit made on 21 June 1988 (6th defendant's affidavit)
(e) 7th defendant Ho Boon Cheng's affidavit made on 18 June 1988 (7th defendant's affidavit)

It may be noted that all the affidavits of defendants 2, 4, 5, 6 and 7 made by and on behalf of themselves are in substance the same.

Background

The background leading to the institution of this action may be thus briefly stated:

By a lease agreement dated 3 January 1984 (Exhibit 'A' annexed to Leong's 1st affidavit) the plaintiff let to the 1st defendant, a limited company, 4 units of caterpillar for a period of 24 months commencing from 3 January 1984 at the monthly rental of RM20,334 payable on the 3rd of each month, the first monthly rent to be paid on 3 January 1984. The plaintiff also avers that by 3 guarantee and indemnity agreements (for brevity, guarantee agreements) all dated 3 January 1984 (Exhibit 'BI', 'B2' and 'B3' annexed to Leong's 1st affidavit) all the other defendants 2 to 8 guaranteed, *inter alia*, the punctual payment of all sums of money that might be due or become due to the plaintiff under the lease agreement and the due performance and observance by the 1st defendant of the stipulations and conditions therein as well as agreeing to indemnify the plaintiff against any loss or damage the plaintiff might sustain under the lease agreement.

It is the case of the plaintiff that the 1st defendant persistently defaulted in the payment of the monthly rentals, that the plaintiff on or about 18 November 1985 terminated the lease agreement and repossessed the 4 tractors and that at the time of the termination, the 1st defendant was in arrears of rentals from the month of February 1985 to November 1985 totalling RM203,334. The plaintiff also claims a sum of RM29,556.28 being repossession and incidental expenses, as well as "overdue interest" RM53,024.94 and "further interest" as particularised above.

Having regard to the issues raised and the manner the arguments developed, I find it convenient to deal with the application under separate heads as follows:

1. Issues relating to the 1st defendant under the lease agreement;
2. Issues relating to the defendants 2, 4, 5, 6 and 7 as guarantors under the guarantee agreements;
3. Issue common to all the 6 defendants in this application; and
4. Sums claimed.

At the conclusion of the hearing of this application, it came to light that the 2nd, 5th, 6th and 7th defendants had been made bankrupts and that the 8th defendant had passed away. The plaintiff therefore had to effect the necessary changes to the parties in the action. This substantially caused the delay in the delivery of this judgment.

1. *Issues relating to the 1st defendant under the lease agreement*

I would, at the outset, point out that there is no specific denial by the 1st defendant that it had defaulted in the payments of the monthly rentals from February to November 1985 totalling RM203,334. The general pleas of "does not admit" and "put the plaintiff to strict proof thereof" in para. 1 of the 1st defendant's defence (and, for that matter, in para. 1 of the joint defence of the other defendants in this application) are not sufficient traverses [*Rutter v. Tregent* [1879] 12 Ch D 758] and, if at all of any worth, have been effectively refuted by the affidavit evidence of James Leong which categorically asserted the 1st defendant's defaults in paying the monthly rentals and to which the 1st defendant did not at all, by affidavit, controvert.

With specific reference to the 1st defendant's case, Counsel for the defendants raised only 2 points at the hearing of this application. The 2 points are:

(a) That the equipments were sold at prices substantially lower than and without regard to reasonable market value and the amount claimed against the defendants was accordingly affected. (Paragraph 6 of Ho Boon Hong's affidavit made on behalf of the 1st defendant on 20 June 1988).

The 1st defendant, however, did not adduce any evidence to show the alleged unreasonableness of the sale prices nor state what was the reasonable market value. As such the point raised is a bare allegation.

For the plaintiff it was contended that the agreement being a leasing agreement, ownership of the equipment lay with the plaintiff; the question of sales undervalue, even if true, was irrelevant since there was no legal obligation on the part of the plaintiff to account for the sale proceeds by way of deduction of the amount claimed. In the view, which may be seen later, I take of this application, I prefer to express no view on the contention at this stage. The issue of the 1st defendant, at best, relates to quantification of the amount claimed, and, if properly raised, may be considered later.

(b) That the action is premature and not maintainable because the lease agreement had not been validly terminated. (Paragraph 3 of Ho Boon Hong's affidavit made on 1st defendant's behalf on 20 June 1988).

The basis for alleging that the agreement had not been validly terminated was not given in the said para. 3. However, on behalf of the 1st defendant, it was contended that the date of termination was not stated in the amended statement of claim. The point is without merit.

Whilst it is true that there is no evidence of the plaintiff giving notice determining the agreement, in the absence of any statutory requirement, such a notice is, in my view, not essential and the plaintiff was not obliged to give notice of termination to the lessee unless so required by the agreement. (*North Central Wagon And Finance Co. Ltd. v. Graham* [1950] 1 All ER 780 albeit a case on hire-purchase agreement). In our instant case, Clause 16.1(i) of the lease agreement provides, *inter alia*, that if the lessee defaults in the payment of the sums payable under the lease the lessor may immediately terminate the lease without notice and resume possession of the equipment. While the relevant part of para. 4 of the amended statement of claim could, admittedly, have been better drafted, whatever ambiguity there was, has been cleared in para. 3 of Leong's 1st affidavit in which it was clearly stated that the lease agreement was terminated "on or around 18 November 1985" and the 4 units of caterpillar repossessed.

Other points pleaded in the 1st defendant's defence relating to the question of liability (as opposed to damages) were not argued on behalf of the 1st defendant at the hearing. The points pleaded are that the lease agreement is invalid, void and unenforceable because it is "lopsided, harsh, oppressive, inequitable and unconscionable bargains; particularly having regard to the provisions of Clause 14 and Clause 16 of the same and "that the Clause 14 and Clause 16.3 are penalty clauses and any interests and damages calculated thereon are unenforceable". (Paragraph 2 of the 1st defendant's defence). These points and matters in support thereof were not deposed to in the affidavit made on the 1st defendant's behalf, nor, as stated earlier, was any submission made thereon except an indication, at the last date of hearing, that the defendants would rely on *Credit Corporation (M) Sdn. Bhd. v. Bulan Sabit Sdn. Bhd. & Ors.* [1989] 1 CLJ (Rep) 444.

Clause 14 provides for payment of interest on any money which should be paid under the lease agreement but was not paid when due. Clause 16 deals with rights of the plaintiff as lessor and liabilities of the 1st defendant as lessee in certain circumstances therein specified including the lessee's defaults.

As a matter of general principle, in the absence of vitiating factors rendering a contract illegal or void *e.g.* contract to commit a legal wrong or being against public policy or affected by statute, persons of full age and competent capacity and understanding are to have full liberty of contracting, and their contracts, when entered into freely and voluntarily, should be respected, held sacred and enforced by Courts of justice. The burden of showing that an agreement is lopsided, harsh and oppressive lies on the party alleging it. Similarly, the onus of showing that a stipulation in a contract is a "penalty clause" lies upon the party who is sued upon it. *Robophone Facilities Ltd. v. Blank* [1966] 1 WLR 1428 at 1447.

Lease Agreement Lopsided Harsh Or Oppressive Inequitable Or Unconscionable?

In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the Court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means. *Multiservice Bookbinding Ltd. & Ors. v. Marden* [1978] 2 All ER 489. In this regard, the following observation of Lord Brightman in *Hart v. O'Connor* [1985] 2 All ER 880 (facts not material) at 891 is illuminating. It was a case to set aside a contract on various grounds including that the agreement represented an unconscionable bargain in favour of the appellant. Lord Brightman said (891):

> it is perfectly plain that historically a Court of equity did not restrain a suit at law on the ground of 'unfairness' unless the conscience of the plaintiff was in some way affected. This might be because of actual fraud ... or constructive fraud, *i.e.* conduct which falls below the standards demanded by equity; traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power (of Snell's Principles of Equity (27th edn. 1973) p. 45 ff). An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. 'Fraud' in its equitable context does not mean, or is not confined to, deceit: 'it means an unconscientious use of the power arising out of [the] circumstances and conditions [of the contracting parties]': see *Earl of Aylesford v. Morris* [1873] LR 8 Ch app 484 at 490-491, [1861-73] All ER Rep. 300 at 303. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

In *Alec Lobb Ltd. v. Total Oil G.B. Ltd.* [1985] 1 All ER 303 C.A. Dillon LJ rejected the contention that where there was unequal bargaining power, the test was whether its terms were fair just and reasonable and that it was unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. He went on (p. 313):

> Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the Courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd. v. Bundy* [1974] 3 All ER 757 at 763, [1975] QB 326 at 336. The Courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in.

In our instant case no evidence at all was adduced to show not only how the lease agreement or any of its terms is, objectively, unreasonable (which, in any event, is not sufficient, see *Multiservice Bookbinding v. Harden supra*, but also the inequality of bargaining power of the parties and how the conduct of the plaintiff could be regarded as oppressive, harsh or unconscionable. There is no evidence of any victimisation or taking advantage of another's weakness or of constructive fraud as explained in the judgment of Lord Brightman) in *Hart v. O' Connor* quoted above.

Clauses 14 And 16.3 Of Lease Agreement Penal?

Having considered Clauses 14 and 16.3 together with Clause 5 of the lease agreement and having regard to the insufficient traverse of the plaintiff's case of non-payment of rentals for 10 months amounting to RM203,334 (which I have earlier dealt with), and in view of the order which I shall herein make, I also find no substance in the allegation that Clauses 14 and 16.3 of the lease agreement are unenforceable as being penal. *Lombard North Central p/c v. Butterworth* [1987] 1 All ER 267 is, in my opinion, of assistance. In that case the defendant agreed to hire a computer from the plaintiffs for a period of 5 years. The agreement provided for an initial payment and 19 subsequent quarterly rentals. By Clause 2(a)(i) punctual payment was of the essence of the contract. By Clause 5 the plaintiffs were entitled to repossess the computer if the defendant defaulted in punctual payment. Under Clause 6(a),

in the event of repossession the defendant had to pay all arrears of rental, all future rentals which would have been payable and damages for breach of the agreement including all expenses for repossession and value added tax. The defendant paid the first 2 rentals promptly but was late in the next 3. After due notice, the plaintiffs repossessed the computer which they sold. Then they commenced proceedings claiming the sum of £6,900 which was made up of arrears of rental, value added tax, further rentals, less the net proceeds of sale and other allowances. The plaintiffs also claimed for damages and interest for breach of contract. Upon an application for summary judgment under O. 14, the plaintiffs obtained a judgment for damages to be assessed which were subsequently assessed. On appeal, the defendant argued that Clause 6(a) was a penalty, denied that he had repudiated the agreement and claimed that the plaintiffs were entitled only to the rentals outstanding at the date of repossession. The appellate Court held that:

(a) In the absence of a repudiatory breach, Clause 6 created a penalty in so far as it purported to require the defendant to make payment in respect of rental installments which had not accrued at the date of termination regardless of the seriousness or triviality of the breach which resulted in the plaintiffs terminating the agreement. Consequently, Clause 6 was unenforceable.

(b) However, the provision in Clause 2(a) of the agreement that punctual payment of the installments was of the essence of the agreement made prompt payment a condition, and when Clause 2(a) was read with Clauses 5 and 6 it had the effect of making default in punctual payment a breach of the agreement going to the root of the contract and accordingly, even though that breach on its own was not sufficient to constitute repudiation, it entitled the plaintiffs to terminate the contract, independently of Clause 6 and to recover damages for the loss of the whole transaction. (see the headnote to *Lombard North Central p/c v. Butterworth, supra*, Held (1) and (3)).

Now, Clauses 2(a), 5 and 6 of the agreement in *Lombard North Central p/c v. Butterworth, supra*, are same in nature and comparable to Clauses 53 and 16 of the lease agreement in our instant case. I would add that the element of repudiation leans more in favour of the plaintiff in our instant case where the evidence points to a default of 10 consecutive monthly rentals compared to *Lombard North Central p/c v. Butterworth, supra*, where the breaches were in late payment (as opposed to non-payment) of 3 instalments and another instalment being overdue and unpaid. It should also be noted that in our instant case the 1st defendant was not saying that there was no termination but rather that the termination was invalid with which I have already dealt earlier.

On the materials before me, the 1st defendant fails to show the existence of any triable or arguable issue respecting lopsidedness, harshness *etc.* and penal nature of the contract as pleaded which remain no more than mere allegations.

The defence cited *Credit Corporation (M) Bhd. v. Bulan Sabit Sdn. Bhd. & Ors.* [1989] 1 CLJ (Rep) 444. So far as is relevant, that case, in my opinion, is distinguishable and has to be considered on its own facts. There, the Court considered only one clause (cited as 'Clause 8') of the leasing agreement. It is also not clear from the judgment whether the leasing agreement in that case contained provision similar or comparable to that in Clause 5.3 in the leasing agreement in our instant case. Even if it did, the provision did not fall to be considered. Secondly, the observation of Shankar J on O. 14 (at p. 446) has to be considered in the light of the *Credit Corporation (M) Berhad's* stand which, from the following passage in the judgment, appeared to insist on judgment for the sum claimed:

> Mr. Chang sought to submit that since liability was not disputed in this case and the question was purely one of quantum, the Court should nevertheless enter judgment for the plaintiffs and leave the damages to be assessed. In this case he submitted that the assessment would be academic because the amount claimed by the plaintiffs accurately represented what they were entitled to under the terms of the agreement.

I would also briefly mention the Australian case of *O' Dea & Ors. v. Allstates Leasing System (WA) Pty Ltd. & Ors*. [1982-83] 152 CLR 359 described in *Credit Corporation (M) Bhd. v. Bulan Sabit Sdn. Bhd. & Ors. supra*, as "right on point". An important distinction is that in the above 2 cases (*i.e. O' Dea's* case and *Credit Corporation (M) Berhad's* case, *supra*) the rentals claimed were **all** the rents under the agreements *i.e.* rent-instalments due and payable **after** repossession or termination of the agreements, whereas in our instant case the O. 14 summons, in so far as concerning rentals, claims are up to termination of the lease agreement or repossession of the tractors. As regard rentals up to the repossession of the tractors, it appears doubtless that liability of the 1st defendant therefore is beyond question. In *O' Dea & Ors. v. Allstates Leasing System (WA) Pty Ltd. & Ors., supra*, Gibbs CJ, after holding that the provisions of the contract requiring payment of the entire rent amounted to a penalty, went on to say (p. 374):

> The first respondent is, however, entitled to recover such unpaid instalments as were due before it retook possession of the vehicle and such damages as may be proved to have been occasioned by the breach of the conditions of the lease.

At p. 383:

> Of course, this conclusion does not mean that the lessee cannot be liable to Allstates, ... for the arrears of rent payable in respect of the period prior to repossession and perhaps for damages. (Per Wilson J).

At p. 395:

> The lessor is entitled to judgment for the unpaid instalments which became due prior to the date of repossession, for any damages for the lessees' breach of contract which the lessor may be able to establish and for interest. (Per Brennan J).

At p. 404:

> *Prima facie*, Allstates is also entitled to claim ..., any further instalments due before the retaking of possession and any additional amount of damage which it has actually sustained (see *Public Works Commissioner v. Hills* [1906] AC at pp. 376-377). (Per Deane J).

I am satisfied that the 1st defendant has failed to raise any triable or arguable issue so far as concerning its liability under the lease agreement.

2. *Issues relating to defendants 2, 4, 5, 6 and 7 as guarantors under the guarantee agreements*

There are 3 guarantee agreements all dated 3 January 1984 containing identical terms and conditions, copies of which are annexed to James Leong's 1st affidavit. They are:

(i) Exhibit BI signed by defendants 4, 5 and 6.
(ii) Exhibit B2 signed by defendants 2, 3 and 8.
(iii) Exhibit B3 signed by defendant 7.

It is not disputed that defendants 2, 4, 5, 6 and 7 signed the guarantee agreements. Their basis for disclaiming liability, however, is that they had signed the guarantees in complete reliance upon the false and fraudulent misrepresentation of the 8th defendant Wong Yu King that the documents were to enable the 1st defendant to obtain loan facilities (see para. 3 of their respective affidavits and para. 2 of their joint defence).

It was also contended that one Wong Sing Chiik who, on the face of the guarantee agreements, attested the signatures of the defendants 2, 4, 5, 6 and 7 was not present. This was not challenged by the plaintiff. On the evidence, I accept that Wong Sing Chiik was not present at the time or times the guarantor-defendants signed the guarantees.

For the purpose of this application, it must be assumed that the alleged fraudulent misrepresentation was made by the 8th defendant who had died. On that basis the defence case could be conveniently considered in 2 aspects:

(a) effect of the fraudulent misrepresentation; and

(b) availability of *non est factum*.

Fraudulent Misrepresentation

Sections 95 and 96 of the Contracts Act 1950 provide:

> 95. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.
>
> 96. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid.

The expression 'creditor' means a person to whom the guarantee is given. (Section 79).

Thus, to avoid a guarantee, it must be shown that the guarantee had been obtained by means of misrepresentation made by the plaintiff, its servant or agent, or with knowledge and assent that may be properly imputed to the plaintiff, or that the guarantee was obtained by the plaintiff by means of keeping silence as to material circumstance. The expression "'keeping silence' clearly implies intentional concealment as distinguished from mere non-disclosure". (*Balkrishna v. Bank of Bengal* [1891] 15 Bom. 585, 591). To intentionally conceal a matter one must have knowledge of that matter. In the instant case, the fraudulent misrepresentation was allegedly made by the 8th defendant (deceased). There is no evidence or even suggestion that it was made with the knowledge and assent of the plaintiff nor that the plaintiff knew of the making of the fraudulent misrepresentation and chose to keep silent about it. The contention that the plaintiff's servants or agents (unidentified) knew of the 1st defendant-company being solely managed by the 8th defendant alone is no valid ground for saying that the plaintiff knew of the fraudulent misrepresentation having allegedly been made.

Non Est Factum

The onus, which is a heavy one, of establishing the plea of *non est factum* lies on the signatory seeking to disown the document, and he must show that in signing the document, he acted with reasonable care. In *Saunders v. Anglia Building Society* [1970] 3 All ER 961 Lord Reid said (at p. 963):

> So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.

Saunder's case also establishes that only in very exceptional circumstances can the plea be available to a man of full capacity, and that, although it is not confined to blind and illiterate persons, any extension of the scope of the plea will be kept within narrow limits.

Saunder's case also makes clear that to make out the plea of *non est factum*, a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to negligence or carelessness on his part. In the context of an application for summary judgment, a defendant of course need only to establish that in respect of the above elements there exist some triable or arguable issue to be tried.

As to the meaning of negligence or carelessness in relation to the plea of *non est factum*, and the necessity and effect of taking precaution, I would refer to an excerpt in the judgment of the Australian case of *Petelin v. Cullen* [1975] 132 CLR 355 at 360:

> It is now settled beyond any shadow of doubt that when we speak of negligence or carelessness in connection with *non est factum* we are not referring to the tort of negligence but to a mere failure to take reasonable precautions in ascertaining the character of a document before signing it. The insistence that such precautions should be taken as a condition of making out the defence is of fundamental importance when the defence is asserted against an innocent person, whether a third party to the transaction or not, who relies on the document and the signature which it bears and who is unaware of the circumstances in which it came to be executed. It is otherwise when the defence is asserted against the other party to the transaction who is aware of the circumstances in which it came to be executed and who knows (because the document was signed on his representation) or has reason to suspect that it was executed under some misapprehension as to its character. In such a case the law must give effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind for there is no conflicting or countervailing consideration to be accommodated no innocent person has placed reliance on the signature without reason to doubt its validity.

In the instant case there is no evidence or suggestion that any of the defendants 2, 4, 5, 6 and 7 were blind or illiterate or not of full capacity or that they do not read or write English. In fact, copies of the guarantees exhibited show that they all could sign and that except for the 4th defendant, and, perhaps, the 7th defendant, the others signed in English.

There is no allegation against the plaintiff having committed any fraud or falsity. The complaint was merely that the plaintiff was negligent in permitting the 8th defendant to obtain the signatures of defendants 2, 4, 5, 6 and 7 fraudulently, and the basis for alleging that the plaintiff was negligent was that the plaintiff's servants or agents knew that the 1st defendant-company was solely managed by the 8th defendant (who had died). With respect, I agree with Counsel for the plaintiff that merely because the plaintiff through its servants or agents knew that the 8th defendant ran the defendant-company is no basis for saying that the plaintiff was negligent as alleged. Even if the plaintiff had been negligent' in the manner as alleged, that affords no ground for defendants 2, 4, 5, 6 and 7 to avail themselves of the plea. In order that the plea may be available, a defendant must show that he, in signing the documents, had acted with reasonable care (*Saunders v. Anglia Building Society* [1970] 3 All ER 961 HL at 963), or had exercised reasonable care in the circumstances in connection with the transaction. *Avon Finance Co. Ltd. v. Bridger & Anor*. [1985] 2 All ER 281 CA. In our instant case, bearing in mind that it is an O. 14 application, none of the defendants 2, 4, 5, 6 and 7 have in their affidavits or otherwise given any basis or particulars indicating that they had acted with reasonable care.

Further, the plea is not available to a person whose mistake was a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. (*Saunders* case, *supra*, at 963).

Admission Of 4th Defendant

In the case of the 4th defendant, Lu Mee Ho, there is also evidence, which was not controverted, of admission of guarantee by himself [see Exhibit 'D' annexed to Leong's 2nd affidavit]. Exhibit 'D' was stated to have been copied to the guarantors including defendants 2, 5, 6 and 7. This was not controverted by any of them. Nor any indication that any of them had disclaimed the guarantees on the grounds as contended in this action. I note the discrepancies in that the heading of the said Exhibit 'D' stated the agreement number as L. 0071 whereas the lease agreement was number L. 0072 and that only 3 of the 4 serial numbers of the caterpillars stated in the lease agreement were stated in Exhibit 'D'. However, as stated earlier, the evidence is not controverted or challenged.

Having read the affidavits and having heard submissions by Counsel, while I cannot agree with the submission for the plaintiff that a document of guarantee and an application for facilities were not documents of fundamental difference in character, I am, however, satisfied that defendants 2, 4, 5, 6 and 7 have failed to raise any triable or arguable issue on the plea of *non est factum*.

Demand

For defendants 2, 4, 5, 6 and 7 it was contended that no valid demand was made and the action was therefore premature and not maintainable. (Paragraph 7 of the 2nd defendant's affidavit). It was contended that Exhibit 'C' annexed to Leong's 1st affidavit was not a valid demand since it was addressed to the 1st defendant (principal debtor) and only copied to the other defendants (guarantors). *United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors.* [1987] CLJ (Rep) 1048 was cited in support. With respect, upon the terms of the 'Guarantee & Indemnity' in our instant case, I am unable to agree that a proper and valid demand is a condition precedent to the institution of the action. The 'Guarantee & Indemnity' does not so expressly provide. Nor has it been shown that the nature of the contract requires such a condition to be implied.

Liability of a surety depends upon the terms of the guarantee that he had entered. Whether or not a prior demand is a condition precedent to the institution of an action against the surety must depend on the terms of the guarantee. In our instant case, the 'Guarantee & Indemnity' agreement do not require any demand to be made on the guarantors.

Clauses 1 and 5 of the agreement provide:

> 1. In consideration of you, Fui Lian Credit & Leasing Sdn. Bhd. ... agreeing to enter into the Equipment Lease Agreement, ... we the undersigned hereby jointly and severally guarantee the punctual payment of all sums of money which may be due or become due to you under ... and the due performance and observance by Lessee of the stipulations and conditions therein contained ...
>
> 5. We hereby agree to indemnify you against any loss or damage you may sustain as a result of entering into the abovementioned Equipment Lease Agreement with Lessee whether or not such loss or damage results from the commission of any breach by Lessee and whether or not you have legal right to claim against Lessee for such loss or damage or have availed yourself of your legal remedies against Lessee or the Equipment comprised in the above-mentioned Equipment Lease Agreement.

So far as relating to the issue of demand, *United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & Ors.* [1987] CLJ (Rep) 1048 relied on by the defence dealt with Article 17 of the lease agreement in that case. The terms of the guarantee did not fall

to be considered by the Court. There were other grounds (which do not concern us) upon which the order for interlocutory judgment was set aside in *United Prime Corporation's* case, *supra*. That case, therefore, is of no assistance to the guarantor-defendants in our present case.

Counsel for the plaintiff submitted on law relating to contract of indemnity. On the view I take of the guarantee agreement and having regard to the order I am to make in this application, it is unnecessary, at least at this stage, to express any view on the submission.

Lopsidedness, Harshness Etc. And Penal Nature Of The Lease Agreement

Defendants 2, 4, 5, 6 and 7 also argued that they were relieved of the responsibility and liability under the guarantee agreements on the alleged ground of unenforcebility of the lease agreement (para. 4 of their joint defence). The alleged unenforcebility of the lease agreement was based on the contentions of lopsidedness, harshness and oppressiveness *etc.* of the said agreement and the attacks on Clauses 14 and 16 thereof. I have dealt with them when considering the case of the 1st defendant. For the same reasons given therein, the present allegations must also fail.

Sale Under Value

By their affidavits the defendants contended that the tractors disposed of at RM14,800, were sold substantially undervalue without regard for the reasonable value. This point was not specifically raised in the defences. Nor was any evidence adduced or foundation laid to show what the reasonable value was or ought to be. It is a mere allegation. No triable or arguable issue had been raised on this point, at least in relation to liability of the defendants under the 'Guarantee & Indemnity' agreements.

I am satisfied that defendants 2, 4, 5, 6 and 7 have failed to raise any triable or arguable issue respecting their liability (as opposed to damages which shall be dealt with shortly) under the guarantees.

3. *Issues common to all defendants to this application.*

Accountability of sales proceeds.

For the defendants, it was argued that this application is not maintainable because the aggregate of RM288,334 made up of the security deposit (RM120,000), the prepaid rent (RM20,334) and the sale proceeds (RM108,000) should be accounted for and used to deduct the plaintiff's claim in this action; and when so deployed, the plaintiff would not be entitled to judgment in any monetary term. For the plaintiff it was contended that under Clause 16.3 of the lease agreement, the defendants were not entitled to use the sale proceeds to deduct the plaintiff's claim, and that, in any event, if the plaintiff's claim of further interest on RM203,334 at 0.065% per day from 9 January 1986 as claimed in this application were calculated, the plaintiff's claim would have exceeded RM288,334. As regards the latter point, purely from the view of mathematical calculation, I agree, that is to say, the further interest calculated to 18 November 1987 *i.e.* date of the application (let alone to the date of actual payment) would have been RM24,586.70 which, if added to the claim of RM285,915.22 would have exceeded RM288,334. The defence contention, therefore, fails.

I decline expressing any view on the deductibility or otherwise of the sale proceeds in diminution of the plaintiff's claim. If so desired, the matter may be further pursued at some

later stage.

The case of *United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oil (M) Sdn. Bhd.* [1982] CLJ (Rep) 358 cited on behalf of the defendants has no bearing on the point in issue but is rather that on its own facts, there were triable issues and unconditional leave ought to have been granted.

The application, therefore, is not unmaintainable and is not bad in *limine* and may proceed.

In *Moschi v. Lep Air Services Ltd.* [1972] 2 All ER 393 HL it was held that where a guarantor guaranteed a creditor that the principal debtor would carry out its contract, then, if at any time and for any reason the principal debtor failed to act as required by its contract, the principal not only broke its own contract but also put the guarantor in breach of his contract of guarantee thereby entitling the creditor to sue for damages, and that if the contract of guarantee was that the principal debtor would carry out the principal contract, the damages payable by the guarantor would be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he (the principal debtor) would do. In the light of *Moschi v. Lep Air Services Ltd.* and *O' Dea & Ors. v. Allstates Leasing System (WA) Pty. Ltd. & Ors., supra*, it is clear that the liability of the guarantor-defendants in our instant case for damages would include the installments payable up to the date of repossession of the 4 tractors by reason of the 1st defendant (lessee) having defaulted in paying those installments for which it became liable before the date of repossession.

Having regard to the defences raised in the pleadings and having considered all the evidence as adduced and arguments of Counsel, the defendants, in my judgment, have failed to raise any triable or arguable issues so far as relating to their liability under the lease agreement and the guarantee agreements as the case may be.

4. *Sums claimed*

The question remains: Should judgment be given for the amount as claimed? I think not. Apart from such question as deductibility of the sales proceeds which remains open, I would point to another matter *i.e.* the claim of RM29,556.28 as repossession charges and expenses incurred thereafter as particularised in para. 4 of the amended statement of claim and para. 3 of Leong's 1st affidavit. These are liquidated damages or claims and must be strictly proved. In purporting to establish these items, Counsel for the plaintiff referred to various exhibits (receipts) and Exhibit 'C' annexed to Leong's 3rd affidavit as well as Leong's 4th affidavit. With respect, I am not satisfied that the claim of this sum of RM29,556.28 have on balance of probabilities been properly proved. I need mention only some of the unsatisfactory features:

(a) There is no proof of the authorship of the receipts;

(b) In the 3rd column of the said Exhibit 'C', assuming that the figures "30 x 1757" and "30 x 1758" relate to engine or serial numbers of the tractors, they do not tally with those in the lease agreement (Exhibit 'A' annexed to Leong's 1st affidavit) in which the numbers are "30 x 1657" and "30 x 1658";

(c) Some of the copies of the receipts are not, at all clear and decipherable;

(d) A receipt No. 0330 from one Shin Yang Sdn. Bhd. was purported to be freight charges in relation to the claim of RM9,142.86 in this suit (see, Exhibit 'C' item 10 in Leong's 3rd affidavit). Yet para. 3 of Leong's 3rd affidavit made no mention at all of "freight charges". While it is true that the said para. 3 stated cost of transportation" but then there is an item of "transportation charges" in the amended statement of claim. Some

explanation, at least, is required;

(e) The receipt No. 0035 of Glexim Engineering Sdn. Bhd. for RM100 was purported to be in support of the claim of advertising charges of RM57.14 (Exhibit 'B' and item 6 of Exhibit 'C' in Leong's 3rd affidavit). In the absence of any explanation one may be excused in wondering how Glexim, by its name being an engineering company, came to charge advertising fee;

(f) A sales commission of RM5,000 is claimed. (Paragraph 4 of the amended statement of claim). There is nothing showing to whom this was paid. Receipt No. 8150 annexed to Leong's 3rd affidavit purported to be in support thereof does not show by whom it was issued. Also, the receipt appears to relate to 5 units of tractors whereas our instant case concerns only 4. Moreover, para. 3 of Leong's 3rd affidavit made no mention at all about commission.

Having regard to the unsatisfactory features of the evidence in relation to the sums claimed, I am not prepared to grant summary judgment for the specific aggregate sum as claimed.

To sum up, after considering the pleadings, the evidence adduced and after hearing arguments by Counsel, it seems to me clear that in truth there is in this case no defence on the issue of liability of the defendants on the lease agreement and on the guarantee agreements. I so hold. As regards the amount claimed, on account of the unsatisfactory features as stated above, I am not prepared to order judgment for the amount claimed but would, which I now do, order that judgment be entered for the plaintiff against the 1st, 2nd, 4th, 5th, 6th and 7th defendants for damages, (including arrears of rentals) and interest as claimed to be assessed and paid by the said defendants to the plaintiff.

As to costs, since the plaintiff has only partially succeeded, I order that one-half of the costs of and occasioned by this application be paid by the said defendants to the plaintiff. In the absence of an agreement, such costs may be taxed.

One final observation. Though the summons and the affidavits in support were not prepared in line with the provisions of O. 14 r. 2(1), (*i.e.* that there is no defence to the action except as to damages), the relief, nevertheless, is granted. This is mainly because on the pleadings and the evidence adduced, the points raised relating to liability under the agreements are, to my mind, clear and unarguable However, it must be stressed that, as a matter of good practice, should-there be reasonable basis for believing that there is valid defence only as to damages, the O. 14 summons and the affidavit evidence in support must be accordingly tailored.

Also found at [1991] 1 CLJ 522